**DATO' SRI MOHD NAJIB HJ ABD RAZAK**
**v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AHMAD NASFY YASIN JCA
NORDIN HASSAN JCA
[CRIMINAL APPEAL NOS: W-05-242-07-2021
& W-05-243-07-2021]
8 DECEMBER 2022

**Abstract** – *The court has the discretion to make an order for the production or inspection of documents or things if they are necessary or desirable for any investigation, inquiry, trial or other proceedings. The settled principle attached to an application for discovery under s. 51 of the Criminal Procedure Code is that a roving and fishing inquiry for evidence is not permissible; a catch-all cast cannot be cast.*

***CRIMINAL PROCEDURE:*** *Disclosure of information – Production of documents, materials and items – Application for – Applicant, former Prime Minister of Malaysia, charged with four charges of gratification and 21 charges of money laundering – Whether documents, materials and items sought necessary and desirable for trial – Whether relevant to issues for adjudication – Criminal Procedure Code, ss. 51 & 51A*

***CRIMINAL PROCEDURE:*** *Witness – Calling for certain witnesses to testify during prosecution's case – Application for – Applicant, former Prime Minister of Malaysia, charged with four charges of gratification and 21 charges of money laundering – Whether calling of witnesses' material to prosecution's case – Criminal Procedure Code, s. 425*

The appellant was charged at the High Court with: (i) four charges of gratification, an offence under s. 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ('MACCA'); and (ii) 21 charges of money laundering, an offence under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUA'). The appellant had sought orders (i) to compel the production of certain documents, materials and items, pursuant to ss. 51 and 51A of the Criminal Procedure Code ('CPC'); and (ii) to call certain witnesses, pursuant to s. 425 of the CPC. The High Court dismissed the appellant's applications. Hence, the present appeals. In support of his appeal, the appellant submitted that the documents sought were necessary and desirable for the trial as they were relevant to the issues for adjudication of the court. The appellant argued that: (i) the documents were relevant to cross-examine Tan Sri Zeti Aziz ('Tan Sri Zeti') to show that her integrity as the Governor of Bank Negara was

compromised and that she failed to exercise due diligence and failed to alert the appellant on the transactions in the appellant's bank account that raised 'red flags'; (ii) the respondent owed a prosecutorial duty to the appellant for materials that were possibly favourable to the appellant which included the witness' statements to ensure a fair trial; (iii) in an affidavit by one of the investigation officers, SAC Rajagopal from the Malaysian Royal Police, before another court in forfeiture proceedings, he had made a finding that the 1MDB officials had misappropriated a substantial portion from the issuance of the bonds of approximately USD$1.367 billion without the knowledge or consent of the 1MDB's board of directors. Therefore, the findings, together with their supporting documents, would lend support to the appellant's defence of criminal conspiracy between Low Taek Jho and the senior management officials of 1MDB. The evidence that SAC Rajagopal relied upon to form his findings was said to be in the possession of the investigating authorities; (iv) Tim Lessner was amongst the key employees of Goldman Sachs that was responsible for creating financial structures that aided in the fraudulent misappropriation of the proceeds from the 1MDB bonds without the appellant's knowledge. The contents of Tim Lessner's iPhone's could likely show communications that would disclose evidence that the appellant had no knowledge about the criminal conspiracy; (v) the settlement agreement between the Government of Malaysia and Goldman Sachs ('settlement agreement') may contain a clause that required Goldman Sachs and its employees to cooperate with the respondent which included Goldman Sachs' representatives and employees being called as witnesses in the 1MDB trial. Such clause in the settlement agreement would oblige and compel such witnesses to give evidence favourable to the respondent and to suppress evidence favourable to the appellant; and (vi) the appellant sought an order for the court to summon three investigation officers to testify in court during the prosecution's case. As their names were not listed in the respondent's list of witnesses, it would deprive the appellant the opportunity to pose questions to them as to what had transpired in the criminal scheme before the court.

**Held (dismissing appeals):**

**(1)** There was no relevance between the evidence sought through the bank documents and other documents relating to the alleged receiving of funds by Tan Sri Zeti's family with the offences charged against the appellant. The bank accounts, or other documents of a third party not related to the case or charges against the appellant, was in no way relevant to the trial. These documents, which were unrelated to the appellant, would not assist the appellant to establish the lack of knowledge of the transactions in the appellant's bank account. In addition, the appellant's defence was that he was duped by Jho Low. Therefore, the documents sought would not assist the appellant's defence. Moreover, the credibility of Tan Sri Zeti, even if she was

proven not credible, would not conclusively show consistency or inconsistency with the facts in issue in the present case. The outcome of the cross-examination of Tan Sri Zeti using the documents sought, if allowed, was uncertain and speculative in nature. (paras 50 & 52)

**(2)** As there was a real danger of tampering with the witnesses if the statements were to be disclosed, it was undesirable of its production pursuant to s. 51 of the CPC. In addition, the appellant's application for the production of all investigation statements recorded under s. 32 of the AMLATFPUA and s. 30(8) of the MACCA amounted to a fishing inquiry. This too could be seen in the notice of motion which stated, among others, that the documents sought were in all probability, favourable to the defence of the appellant. The appellant also failed to show the relevancy of those documents to the trial against him. Above all, the decision of the trial judge in dismissing the application for witness statements was not an order falling within the definition of 'decision' in s. 3 of the Courts of Judicature Act 1964 ('CJA') and, therefore, not appealable under s. 50(1) of the CJA. The appellant's application for the witness' statements was without merit. (paras 60, 61 & 63)

**(3)** The documents in relation to SAC Rajagopal's averments in his affidavits, if existed, were not relevant to the case against the appellant for using his position for gratification and receiving proceeds of unlawful activity. The involvement of another person, even if proven, did not exonerate the appellant of the charges against him. The documents sought were unspecified and the application was more of a roving and fishing expedition which was not permitted by law. (paras 64-66)

**(4)** The items and documents in relation to Tim Lessner were not in the possession of the respondent and, as such, the court would not act in vain in ordering its production which could not be complied with by the respondent. (para 67)

**(5)** The settlement agreement was merely speculative and a fishing inquiry that should not be permitted. (para 69)

**(6)** No basis was advanced to show the materiality of the three investigation officers to the prosecution's case. The opportunity to examine these witnesses was still open at the defence stage by the defence calling them to testify. The appellant failed to show that the calling of these witnesses was for the just decision of the case, as envisaged under s. 425 of the CPC. As such, the appellant's application was bereft of any merit. (para 77)

**Case(s) referred to:**

*Chua Keem Long v. PP [1996] 1 SLR 510* ***(refd)***
*Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC* ***(refd)***
*Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC* ***(refd)***

A *Dato' Seri Najib Hj Abd Razak v. PP [2019] 1 LNS 434 FC* ***(refd)***
*Husdi v. PP [1979] 1 LNS 33 HC* ***(refd)***
*Husdi v. PP [1980] 1 LNS 29 FC* ***(refd)***
*Ismail v. Hasnul And Abdul Ghafar v. Hasnul [1967] 1 LNS 60 FC* ***(refd)***
*PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA* ***(refd)***
*PP v. Mohd Najib Hj Abdul Razak & Ors (Criminal Application No: WA-44-77-05-2019) (Unreported)* ***(refd)***
B
*PP v. OBYU Holding Sdn Bhd (Criminal Application No. WA-44-86-05-2019) (Unreported)* ***(refd)***
*PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC* ***(refd)***
*PP v. Teoh Choon Teck [1962] 1 LNS 141 HC* ***(refd)***
C
*Rosli Yusof v. PP [2021] 7 CLJ 681 FC* ***(refd)***
*Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC* ***(refd)***
*Siti Aisyah v. PP [2019] 7 CLJ 27 CA* ***(refd)***
*State of Orissa v. Debendra Nath Padhi [2004] 4 LRI 860* ***(refd)***

**Legislation referred to:**
D Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities Act 2001, ss. 4(1), 32
Courts of Judicature Act 1964, ss. 3, 50(1)
Criminal Procedure Code, ss. 51, 51A(c), 112, 152, 153, 154, 425
Evidence Act 1950, ss. 5, 11, 15, 114(g)
Malaysian Anti-Corruption Commission Act 2009, ss. 23(1), 30(8)
E
Criminal Procedure Code [India], s. 91

**Other source(s) referred to:**
*Sohoni's Code of Criminal Procedure*, 19th edn 1973, vol 1, p 388

*For the appellant - Muhammad Shafee Abdullah, Tania Scivetti, Effa Azuin Aidrul Hisham & Alaistair Brandah Norman; M/s Shafee & Co*
F
*For the respondent - Gopal Sri Ram, Ahmad Akram Gharib, Mohamad Mustafa P Kunyalam, Hazmida Haris Lee & Fariza Amira Azman; DPPs*

*[Editor's note: For the High Court judgment, please see Dato' Sri Mohd Najib Hj Abd Razak v. PP [2021] 1 LNS 1095 (affirmed).]*

G
*Reported by Najib Tamby*

## JUDGMENT

**Nordin Hassan JCA:**

H
**[1]** This is the appellant's appeal against the decision of the Kuala Lumpur High Court on 12 July 2021 in dismissing the appellant's applications by way of originating motions for an order to compel the production of documents, materials, and items under ss. 51 and 51A of the Criminal Procedure Code ("the CPC"). Further, the application also includes an order that the court
I call certain witnesses under s. 425 of the CPC.

**The Background Facts**

**[2]** In the first Originating Motion No: WA-44-42-03-2021 dated 24 March 2021, the appellant sought the following order:

(i) The production of documents relating to funds allegedly received by members of Tan Sri Zeti Aziz's family. The details of the documents are stated in paras. (a)(i) to (xvii) of the notice of motion.

(ii) The production of all investigation statements recorded under s. 32 of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities Act 2001("the AMLATFPUA") and s. 30(8) of the Malaysian Anti-Corruption Commission Act 2009 ("the MACC Act") in relation to the companies and accounts as stated in para. (a)(xviii) of the notice of motion.

(iii) The production of documents in relation to averments made by SAC Rajagopal a/l Ramadhass in his affidavit-in-support dated 6 May 2019 in a forfeiture case of *PP v. OBYU Holding Sdn Bhd*, Criminal Application No. WA-44-86-05-2019 and his affidavit in support dated 2 September 2020 in the forfeiture case of *PP v. Mohd Najib Hj Abdul Razak & Ors*, Criminal Application No: WA-44-77-05-2019.

(iv) The court to summon and/or subpoena SAC Rajagopal a/l Ramadhass, from Malaysian Royal Police, Deputy Commissioner, Malaysian Anti-Corruption Commission, Mohamad Zamri bin Zainul Abidin, and Mohd Fuad Arshad, Director of Financial Intelligence and Enforcement Department, Bank Negara Malaysia to be examined by the court and/or the appellant solicitor and/or the respondent.

**[3]** The grounds of the appellant's application as stated in the notice of motion, in essence, are that the documents sought are relevant to enable the court to arrive at a fair and just decision, the documents in all probability consist of documents favourable to the defence and omitted or suppressed from production contrary to s. 51A of the CPC and the witnesses sought to be called are essential to the defence and just decision of the case.

**[4]** Next, in the second Originating Motion No: W-44-68-04-2021 dated 7 April 2021, the appellant sought the following order:

(i) The production of Tim Leissner's personal Apple iPhone, its password and all the transcript or forensic report on the iPhone.

(ii) The production of all the data on Goldman Sachs' server including Tim Lessner's communications and data that are stored on the Goldman Sachs servers as well as all communication and data on Tim Lessner's work mobile phones that were delivered by Tim Lessner to Goldman Sachs on 19 January 2016.

(iii) The production of the settlement agreement between the Government of Malaysia and Goldman Sachs Group entered into in 2020.

(iv) The production of all materials and communications including correspondences between the Government of Malaysia and/or respondent and Goldman Sachs Group in relation to the settlement agreement.

**[5]** In the notice of motion, the grounds stipulated therein, apart from the documents sought are relevant for a just and fair decision of the case and in all probability favourable to the defence which was omitted or suppressed from production contrary to s. 51A, the production of Tim Lessner's iPhone and the related documents is pertinent in the interest of justice where they could be obtained under the Mutual Assistance in Criminal Matters Act 2002 ("the MACMA"). Further, the disclosure of the settlement agreement is crucial to the appellant's defence and right to a fair trial.

**The High Court's Decision**

**[6]** As to the first originating motion, The High Court Judge dismissed the application for the production of documents related to Tan Sri Zeti's family and the production of documents regarding the averments by SAC Rajagopal a/l Ramadhass on the ground that the documents are not necessary and desirable for the trial as envisaged under s. 51 of the CPC.

**[7]** As regards the investigation statements by witnesses recorded under AMLATFPUA and the MACC Act, the High Court Judge held that the said documents are privileged documents and undesirable for the prosecution to supply the defence with those documents as there is a real danger of tampering with the witnesses.

**[8]** Next, regarding the application for calling witnesses under s. 425 of the CPC, the High Court decided that the calling of witnesses in the prosecution's case is the prerogative of the prosecution and the defence cannot dictate to the prosecution whom to call as the prosecution's witnesses.

**[9]** In relation to the second originating motion, the High Court held that the documents, materials and information sought by the appellant which is related to Tim Lessner are not in the possession of the respondent and not capable of enforcement by the court. Further, as regards the production of the settlement agreement between the Government of Malaysia and Goldman Sachs and the related information in the form of materials, correspondences and communications, the High Court held that the evidence sought is too speculative, generally stated and not specified. It also amounts to a fishing expedition which is not permitted by law. In addition, the Attorney General cannot be directed nor compelled to exercise his power under the MACMA in respect of information related to Tim Lessner and Goldman Sachs.

**[10]** The appellant's applications in the first and second originating motions were dismissed by the High Court in its entirety. Hence, the two appeals before us under Criminal Appeals No. W-05-242-07-2021 and No. W-05-243-07-2021.

## The Appeal

**[11]** To start with, in the course of the submission by counsel for the appellant, counsel for the appellant admitted that the appellant is not pursuing with the order of production of documents or materials which are not in the possession of the respondent. This we believed, is related to the order of production of items and documents related to Tim Lessner and Goldman Sachs in the second originating motion except for the order of production of the settlement agreement between the Government of Malaysia and Goldman Sachs.

*The Appellant's Submission*

**[12]** Essentially, the appellant in its written and oral submission before us, submitted that the documents sought by the appellant are necessary and desirable for the trial as it is relevant to the issues for adjudication of the court. This is envisaged under s. 51 of the CPC and the Federal Court case of *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436.

The Documents Relating To Funds Allegedly Received By Tan Sri Zeti's Family

**[13]** Regarding these documents, counsel for the appellant submitted that as the appellant was charged *inter alia* under s. 23 of the MACC Act, its core element is using of an office of a public body for the officer's gratification or any relative or associate of his. Therefore, as Tan Sri Zeti was an officer of a public body at the material time and her family members received funds, the information from the documents sought is relevant to the appellant's defence.

**[14]** It was further submitted that as Tan Sri Zeti is listed as a respondent witness and would be called to give evidence. Therefore, the documents are relevant to be used to cross-examine her and other related respondent's witnesses about her credibility as the Governor of Bank Negara at the material time. It was contended that since Tan Sri Zeti's family received payments, her integrity as the Governor of Bank Negara was compromised and failed to exercise due diligence as she failed to alert the appellant on any transactions in the appellant's bank account that raised the 'red flag'.

**[15]** Counsel for the appellant also submitted that the documents are relevant to show the appellant's lack of knowledge about the actual transferor of the monies received in the appellant's bank account as the appellant's defence was that the monies were donations from the Kingdom of Saudi Arabia.

The Witnesses' Statements That Were Recorded By Investigating Authorities Under S. 32 Of The AMLATFPUA And S. 30(8) Of The MACC Act In Relation To The Companies And Accounts As Stated In Para. (A)(xviii) Of The Notice Of Motion

**[16]** In essence, the appellant submitted that the respondent owed a prosecutorial duty to the appellant for materials that are possibly favourable to the appellant which include the witness's statements to ensure a fair trial. This is also envisaged under s. 51A(c) of the CPC which provides for the prosecution to deliver to the accused a written statement of facts favourable to the defence before the commencement of the trial. In this regard, the case of *Siti Aisyah v. PP* [2019] 7 CLJ 27 was relied upon where the court allowed the application for the defence to be supplied with the witness's statement.

Documents In Relation To SAC Rajagopal Ramadhass's Averment In His Affidavits

**[17]** It was the appellant's submission that in SAC Rajagopal's affidavit evidence before another court in forfeiture proceedings, SAC Rajagopal has made a finding that the 1MDB officials ("kakitangan") have misappropriated a substantial portion from the issuance of the bonds of approximately USD$1.367 billion without the knowledge or consent of the 1MDB's board of director. Therefore, the findings together with their supporting documents would support the appellant's defence of criminal conspiracy orchestrated by Low Taek Jho and assisted by senior management officials of 1MDB. The evidence that SAC Rajagopal relied upon to form his findings is said in the possession of the investigating authorities.

Tim Lessner's IPhones, Passwords, And Documents Related To It And Data On Goldman Sachs's Server Related To Tim Lessner's Communications

**[18]** On the production of these items and documents, the appellant submitted that Tim Lessner was amongst the key employees of Goldman Sachs that was responsible for creating financial structures that aided in the fraudulent misappropriation of the proceeds from the 1MDB bonds without the knowledge of the appellant. Tim Lessner's iPhone content could likely show communications that could disclose evidence that the appellant had no knowledge about the criminal conspiracy and the 1MDB officials to whom Tim Lessner paid bribes and kickbacks. Further, the evidence would enable the defence to show that Tim Lessner and Goldman Sachs were accomplices of Low Taek Jho and the senior management team of 1MDB to misappropriate monies from 1MDB.

Settlement Agreement Between The Government Of Malaysia And Goldman Sachs

**[19]** The appellant contended that the settlement agreement may contain a clause that requires Goldman Sachs and its employee to cooperate with the respondent which includes Goldman Sachs representatives and employees being called as witnesses in the 1MDB trial. The appellant believed that such

clause in the said agreement obliges and compels such witnesses to give evidence favourable to the respondent and to suppress evidence favourable to the appellant. Thus, the settlement agreement is necessary and desirable for the trial.

The Calling Of Witnesses During The Prosecution Case Under S. 425 Of The CPC

**[20]** The appellant sought an order for the court to summon SAC Rajagopal a/l Ramadhass from the Malaysian Royal Police, Deputy Commissioner Zamri bin Zainal Abidin from the Malaysian Anti-Corruption Commission and Mohd Fuad Arshad from Bank Negara Malaysia to testify in court during the prosecution case. The appellant contended that as their names are not listed in the respondent list of witnesses, it would deprive the appellant the opportunity to pose questions to them as to what has transpired in the criminal scheme tried before the court.

*The Respondent's Submission*

**[21]** Conversely, the respondent submitted that the documents and information sought are not relevant to the defence as put to the prosecution's witnesses which is the appellant in his capacity as the Prime Minister and Finance Minister was duped by one Low Taek Jho also known as Jho Low. Hence, the documents are not necessary and desirable for the trial.

**[22]** As to the appellant's reason that the documents are needed for the cross-examination of Tan Sri Zeti, the respondent submitted that this amounts to a collateral attack against her. Further, it was submitted that the integrity and credibility of Tan Sri Zeti in itself are not a fact in issue but a collateral fact. Thus, the challenges of Tan Sri Zeti credibility as a witness are not allowed. The respondent further submitted that the appellant's purpose is only to embarrass Tan Sri Zeti as a potential prosecution witness. This amounts to an abuse of the court's process and as such, the application is frivolous and vexatious.

**[23]** In regard to the production of witness statements recorded by the investigating authorities, the respondent submitted that the documents are privileged documents and undesirable for the prosecution to supply the defence with the statements as there is a real danger of tampering with witnesses.

**[24]** On the calling of witnesses at the prosecution's stage, the respondent submitted that it is the sole prerogative of the respondent to determine whom to call and the number of witnesses to be called to prove the charges against the appellant. The appellant should not dictate the calling of witnesses in the course of the prosecution's case. Further, the appellant, at the defence stage, can always call these witnesses to testify.

A

## Analysis And Decision Of This Court

*The Law*

**[25]** The law governing the production or supply of documents by parties are ss. 51 and 51A of the CPC. Section 51 provides:

B

> **Summons to produce documents or other things**
>
> 51.(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is **necessary or desirable for the purposes of** any investigation, inquiry, **trial**, or other proceeding under this Code by or before that Court or officer, such **Court**
>
> C **may** issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce any property
>
> D or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any
>
> E postal article, telegram, or other document in the custody of the postal or telegraph authorities. (emphasis added)

**[26]** The provision of s. 51 is plain and unambiguous that the court has the discretion to make an order for the production or inspection of documents or things if they are necessary or desirable for any investigation, inquiry, trial

F or other proceedings. In our case, for the trial against the appellant. The keywords here are whether the documents or things sought are necessary or desirable for the trial.

**[27]** On this issue of the production of documents or things, the application may be made at any stage of the proceedings. The Supreme Court in

G *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436 divided the two stages in the application of the documents or things under s. 51 of the CPC. They are the pre-trial application and an application in the course of a trial. When the application under s. 51 is made before the trial, in deciding whether the

H production of the documents or things is necessary or desirable, the court must take into consideration ss. 152 to 154 of the CPC where the prosecution must furnish sufficient notice to the accused person of the charge, he has to meet to enable him to adequately prepare his defence.

**[28]** Justice Hashim Yeop Sani SCJ in *Raymond Chia*'s case (*supra*) had this

I to say:

> *Where the Court is asked to exercise its discretion under s. 51 of the Criminal Procedure Code before the commencement of trial the Court must have regard to the provisions of ss. 152, 153, and 154 of the Criminal Procedure Code* relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under s. 51 of the Criminal Procedure Code to any document or copies of the document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. *The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied*. (emphasis added)

**[29]** On the other hand, if the application is made in the course of the trial, the pertinent issue to be considered by the court is the relevancy of the document or thing for the trial. This second stage of the application was explained in *Raymond Chia*'s case in the following manner:

> *Where the application under s. 51(i) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced*. We feel that this is what *Mallal's Criminal Procedure* meant by saying that "anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions"
>
> ...
>
> The answer to questions No. 2 and No. 3 is in the affirmative with a qualification, that is, an accused person has a right to apply for a summons under s. 51 of the Criminal Procedure Code but the issue of the summons is at the discretion of the Court before which the inquiry or trial is heard or pending. Where the application is made before the commencement of inquiry or trial as a general rule the documents or materials must be documents or materials specified or referred to in the charge. *General demand for unspecified materials or documents should not be entertained. Where the application is made in the course of inquiry or trial the court has to consider the question of relevancy to the issues for adjudication*.
>
> (emphasis added)

**[30]** The relevancy of the documents or things sought is an important factor to determine whether those documents or things are necessary or desirable as required under s. 51 of the CPC before the application for its production may be allowed. This is also consistent with the requirement of s. 5 of the Evidence Act 1950 that evidence may be given of facts in issue and relevant facts and of no others.

**[31]** The principle in *Raymond Chia*'s case is reiterated by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265 where this was stated:

> [28] In the context of this appeal, *s. 51 CPC provides that when any court considers that the production of any document is necessary or desirable for the purposes of any trial*, such court may issue a summons to the prosecution who is in possession of such documents.
>
> ...
>
> [41] On further appeal to the Supreme Court, it was held that the court has a discretion to supply the documents asked for by an accused person. However, *if the application is made before the commencement of the trial, the documents or materials to be supplied are confined to those only specified or referred to in the charge. A general demand should not be entertained. If the application is made in the course of a trial, the court needs to consider that the documents and materials asked for must be relevant to the issues for adjudication. The Supreme Court also held that the accused was not entitled to have access to things which were evidence that the prosecution proposed to prove the charge*. One overriding principle expressed by the Supreme Court which we need to mention is that in exercising its discretion the Court would need to consider the justice of the case and at what stage of the proceedings the application for discovery was made. (emphasis added)

**[32]** The Federal Court in the same case opined that the application or scope of s. 51 of the CPC is limited only to the production of documents or material necessary or desirable for the trial. It was held in that case as follows:

> [45] Learned counsel for the appellant then urged us to depart from *Raymond Chia*. We find no justification to do so. We have looked at the authorities presented to us during arguments, including those from India and Singapore, and found them united in their holding that *s. 51 must necessarily operate within certain inbuilt limitations. Although the language in that s. is seemingly wide it should not literally be taken to be capable of allowing for a wide ranging application as was allowed by the High Court in this case. Its scope, according to all the authorities that we have read, is confined to the production of documents or materials which are "necessary or desirable" for the purpose of the trial*. (emphasis added)

**[33]** In *Raymond Chia*'s case, the Supreme Court further explained that a general demand for unspecified documents should not be entertained. A similar position was taken in an earlier case of *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] 29 MLJ 34 where Hepworth J at p. 36 said this:

> The document or thing must be clearly specified, that is, it must indicate the document to be produced and should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial. **A general direction to produce all papers relating to the subject in dispute will not be enforced. It must be directed at a specific document**. (emphasis added)

**[34]** In addition, s. 51 of the CPC should not be invoked to allow roving or 'fishing expedition'. In *Sohoni's Code of Criminal Procedure*, 1973, 19th edn, Vol. 1, p. 388, this was stated:

> If there are documents relied upon by the accused either for dislodging the prosecution case or for building up their own case, he will have to take out a summons for them. **If the object of inspection is merely to fish out for information, it is not a thing that could be permitted**.
>
> (emphasis added)

**[35]** The same view was expressed by the Supreme Court of India in the case of *State of Orissa v. Debendra Nath Padhi* [2004] 4 LRI 860 where reference was made to s. 91 of the Indian Criminal Procedure Code, which is *pari materia* with our s. 51 of the CPC. The court explained as follows:

> [28] We are of the view that jurisdiction under s. 91 of the Code when invoked by the accused the necessity and desirability would have to be seen by the Court in the context of the purpose of - investigation, inquiry, trial, or other proceedings under the Code. **It would also have to be borne in mind that the law does not permit a roving or fishing inquiry**
>
> (emphasis added)

**[36]** This principle of law is consistent with the fact that no party can obtain the evidence of the opposite party using the discovery of documents. This too has been explained in *Teoh Choon Teck*'s case when this was said:

> The need for this section would appear to be that in criminal cases **neither party can obtain evidence from the opposite side by means of interlocutories or discovery of document**. (emphasis added)

**[37]** The avoidance of roving and 'fishing expedition' under s. 51 of the CPC was also emphasised by the Federal Court in *Dato' Seri Anwar Ibrahim*'s case (*supra*) where Abdull Hamid Embong FCJ said this:

> One settled principle attached to the application for discovery **under s 51 CPC is that, at the pre-trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast**.
>
> (emphasis added)

**[38]** This court in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331 also voiced the same stand on this issue when the defence sought to obtain the CCTV and the court held as follows:

> [54] Based on the decision of the Supreme Court in *Raymond Chia* case we were of the view that the order granted by the learned judge in respect of the CCTVs before the commencement of the trial was outside the scope of s. 51 of the Code. *As such the order of the learned judge for the public prosecutor to produce the CCTVs was not a proper exercise of his discretionary powers. As stated in Sohoni's Code of Criminal Procedure, 1973, 19th edn. p. 388 if the object of the inspection is merely to fish out for information, it is not a thing that could be permitted. With due respect to learned counsel for the respondent, we*

*were of the view that the object of the respondent's application for CCTV recordings allegedly taken from the guardhouse and lifts to Block 11 of Desa Damansara Condominium and any other locations within the condominium fitted with CCTVs from 25 June to 27 June 2008 was merely to fish out for information*. The respondent was therefore not entitled to obtain the original CCTV recordings before the commencement of the trial. In the circumstances, the order of the learned judge in allowing the respondent's application in respect of the original CCTV recordings was set aside and the cross-appeal by the respondent was dismissed. (emphasis added)

**[39]** Having highlighted the relevant law on the production and supply of documents, we now consider the appellant's application under the two originating motions and whether there is any appealable error by the High Court in dismissing the motions.

**[40]** Both appellants' applications were made in the course of the trial, that is during the prosecution case. In this regard, s. 51A has no application as the section refers to the prosecution's obligation to supply specific documents to the accused before the commencement of the trial. For ease of reference, the provision is reproduced below:

51A. (1) The prosecution **shall before the commencement of the trial** deliver to the accused the following documents:

(a) a copy of **the information made under s. 107** relating to the commission of the offence to which the accused is charged, if any;

(b) a copy of **any document which would be tendered as part of the evidence for the prosecution**; and

(c) a **written statement of facts favourable to the defence of the** accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest. (emphasis added)

**[41]** The Federal Court in *Dato' Seri Najib Hj Abd Razak v. PP* [2019] 1 LNS 434; [2019] MLJU 282 reiterated that the documents to be supplied to the accused under s. 51A only confined to the documents mentioned in the section. Idrus Harun FCJ explained this in the following words:

[21] The appellant's reasoning advanced by the appellant before us on s. 62 of the MACCA is also misconceived and wholly unmeritorious. This provision imposes on the appellant the obligation to disclose in general terms the nature of the defence which obligation only arises when the prosecution has fulfilled its obligations pursuant to s. 51A of the Code. Section 62 clearly introduces the application of s. 51A of the Code to the MACCA. **Thus, the documents which must be delivered to the appellant by the prosecution are confined to the documents specified in s. 51A of**

**the Code**. By virtue of the application of s. 51A of the Code to the MACCA in s. 62, the contention by the appellant that admissibility is equated to automatic right to disclosure is untenable in law.

(emphasis added)

**[42]** We now revert to the appellant's application for the production of documents and materials.

*The Charge*

**[43]** In the present case, the appellant is facing four charges under s. 23(1) of the MACC Act for using the appellant's position as an officer of a public body, as the Prime Minister, Minister of Finance Malaysia, and as the Chairman of the Advisory Board of 1MDB for gratification and 21 charges of money laundering under sub-s. 4(1) of AMLATFPUA.

**[44]** The four charges under s. 23(1) generally, are similar to each other except for the date, amount, place, and manner the offences were committed. Likewise, the 21 charges of the money laundering offences.

**[45]** Here, it is useful to refer to one of the charges under s. 23(1) of the MACC Act and s. 4(1) of AMLATFPUA to assist this court in arriving at our decision, particularly, on the issue of relevancy of the documents sought by the appellant.

**[46]** The first charge under s. 23(1) of the MACC Act proffered against the appellant is as follows:

That you, between 24th February 2011 and 14 June 2011, at AmIslamic Bank Berhad, Cawangan Raja Chulan, No. 55, Jalan Raja Chulan, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, as an officer of a public body, to wit, Prime Minister and Minister of Finance of Malaysia and the Chairman of the Advisory Board of 1Malaysia Development Berhad (1MDB), **did use your position for a gratification** for yourself totalling RM60,629,839.43, by taking the following action to wit:

(i) On first April 2009, at the Cabinet Meeting Room, Level 4, Prime Minister's Office, Federal Government Administrative Centre, in the Federal Territory of Putrajaya, by way of a Memorandum of the Ministry of Finance No. 216/2639/2009, you did obtain the consent of the Cabinet for the provision of a guarantee by the Government of Malaysia to Terengganu Investment Authority Berhad (TIA) to obtain domestic and foreign market loans of up to RM5 billion by way of Islamic Medium Term Notes Programme;

(ii) On 29th July 2009, at the Cabinet Meeting Room, Level 4, Prime Minister's Office, Federal Government Administrative Centre, in the Federal Territory of Putrajaya, after being appointed as Prime Minister of Malaysia on 3rd April 2009, you did approve the acquisition of TIA by the Government of Malaysia and further caused TIA's name to be changed to 1Malaysia Development Berhad (1MDB), a company in which you have a direct interest;

(iii) On 26th September 2009, you directed the Board of Directors of 1MDB which was having a Special Meeting at the Royale Bintang Damansara, Petaling Jaya, in the state of Selangor, to pass a resolution authorising 1MDB to participate in a joint venture with PetroSaudi Limited by subscribing for 1,000,000,000 (1 Billion) ordinary shares in 1MDB PetroSaudi Limited at US$1.00 each for a total consideration of US$1 Billion (or equivalent in RM); and

(iv) On 16th May 2011, at 1MDB Office, Level 8, Menara IMC, No.8, Jalan Sultan Ismail, in the Federal Territory of Kuala Lumpur, did cause the Board of Directors of 1 MDB to pass a Circular Resolution authorising an investment of an additional RM1 Billion (or equivalent to US$) under the Murabaha Financing Agreement dated 31st March 2010 with PetroSaudi Limited, thereby, you have committed an offence under s. 23(1) of the Malaysian Anti-Corruption Commission Act 2009 [Act 694], punishable under s. 24(1) of the same Act. (emphasis added)

**[47]** As regards the money laundering charges, the first charge is the following:

That you, on 22 March 2013, at Amlslamic Bank Berhad, Jalan Raja Chulan Branch, No 55, Jalan Raja Chulan, Bukit Ceylon, in the Federal Territory of Kuala Lumpur, **did engage in the money laundering,** to wit, **by receiving proceeds of unlawful activity** totalling RM155,000,000 from account number 8550299001 belonging to Tanore Finance Corporation in Falcon Private Bank, Singapore, into Amlslamic Bank Berhad account number 2112022009694 belonging to you, thereby you have committed an offence under para. 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 [Act 613] punishable under sub-s. 4(1) of the same Act. (emphasis added)

*The Production Of Bank Statements And Other Documents Related To The Funds Received By Tan Sri Zeti's Family*

**[48]** As alluded to earlier, the appellant's reason for seeking these documents is that the documents are relevant to the appellant's defence since the appellant was charged with using his public body's office for gratification. It was submitted that the documents are relevant to cross-examine Tan Seri Zeti to show that her integrity as Governor of Bank Negara was compromised, failed to exercise due diligence, failed to alert the appellant on the transactions in the appellant's bank account that raised the 'red flag'. The main purpose is to challenge the credibility of Tan Seri Zeti and to show the appellant's lack of knowledge of the impugned transactions.

**[49]** To begin with, as detailed above, the appellant was charged with offences under s. 23 of the MACC Act for using his position as Prime Minister, Minister of Finance and Chairman of the Advisory Board of 1MDB for gratification. He was also charged with offences under s. 4(1) of AMLATFPUA for receiving proceeds of unlawful activity.

**[50]** In this regard, we do not see any relevance between the evidence sought through the bank documents and other documents relating to the alleged receiving of funds by Tan Seri Zeti's family with the offences charged against the appellant. We find, the bank accounts or other documents of a third party not related to the case or charges against the appellant in no way relevant to the trial. These documents which are unrelated to the appellant, would not assist the appellant to establish the lack of knowledge of the transactions in the appellant's bank account. In addition, the appellant's defence as put to the prosecution's witnesses was that the appellant was duped by Jho Low, thus, we are of the view that the documents sought by the appellant would not assist the appellant's defence.

**[51]** On the issue of the credibility of Tan Sri Zeti, we agree with the High Court Judge that it is not of itself, a fact in issue but a collateral fact. In the present case, the main issues are whether or not the appellant had used his position for gratification and whether or not the appellant had received proceeds of unlawful activity. Generally, collateral facts are not admissible except if it is reasonably conclusive to show that it is consistent or inconsistent with the fact in issue. (see ss. 11 and 15 of the Evidence Act 1950, *Ismail v. Hasnul* and *Abdul Ghafar v. Hasnul* [1967] 1 LNS 60; [1968] 1 MLJ 108 (FC)).

**[52]** We do not find that the credibility of Tan Seri Zeti, even if she is proven not credible, would conclusively show consistency or inconsistency with the fact in issue in the present case. Moreover, the outcome of the cross-examination of Tan Seri Zeti using the documents sought, if allowed, is uncertain and speculative in nature. As discussed earlier, the court should not allow any roving or fishing inquiry.

**[53]** In the circumstances, we find the bank and other documents relating to the alleged receiving of funds by Tan Seri Zeti's family are irrelevant and consequently, not necessary or desirable for the appellant's trial.

*The Witnesses' Statements That Were Recorded By Investigating Authorities Under S. 32 Of The AMLATFPUA And S. 30(8) Of The MACC Act In Relation To The Companies And Accounts As Stated In Para. (a)(xviii) Of The Notice Of Motion*

**[54]** It is trite law that witness statements recorded by investigating authorities are privileged documents. This has been decided in a plethora of cases including our apex courts. Apart from the fact that no statutory provision gives the right to inspect statements given by a witness to the investigating authority, the reason not to disclose a witness's statement is to avoid the real danger of tampering with witnesses.

**[55]** In *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 it was held as follows:

(2) on the other hand, the right to inspect a statement to the police made in the course of police investigations, which is a statutory, not a common law, creature, would depend on the construction of the relevant statutory provisions, particularly those under the Criminal Procedure Code. *There is no provision in the Criminal Procedure Code or the Evidence Act, which is construable as giving a right to inspect such a statement*;

*(3) the statement made to the police in the course of a police investigation is a privileged document and there can therefore be no right to inspect such a document. Further, as a matter of public policy it is undesirable for the prosecution to supply the defence with the police statements, as there is a real danger of tampering with witnesses.*

(emphasis added)

**[56]** Syed Othman FCJ in the same case (sitting in the High Court) having considered other relevant authorities, had this to say:

It was decided there in *Methuram Dass v. Jagannath Dass* ILR 28 Cal 794 that *a statement made in the course of the police investigation was absolutely privileged.* At page 797 the court said:

> In the Present case the investigation was required by law; it was conducted under the provisions of the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all questions put to him by the police officer conducting the investigation and was punishable if he answered untruly and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a court of justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above, – that was in the case of *Dawkins v. Lord Rokeby* (1875) LR 7 HL 744 – why public policy should not equally prevent an action being brought against him as against a witness in an ordinary court of justice.

What should be noted in the above passage is that part of the first sentence which says that the investigation was required by law, *ie*, written law. This covers the act of recording a police statement. But it should be observed that the statement that it was punishable if a person making a police statement answered untruly, appears to be in conflict with the provisions of the Indian Criminal Procedure Code in force at the time. This case was decided in 1901, when under the 1898 Indian Code there is no obligation to speak the truth to the police as indicated by Sohoni and cited above. But, for the purpose of the present case, *we are only concerned with the ruling that a police statement is a privileged document. The Court of Appeal here has followed the Indian decision. In Martin Rhienus v. Sher Singh [1949] MLJ 201 Willan C.J.* after citing the above passage at page 203 said:

> I agree with that decision and the reasoning for it.
>
> The question was raised by the court whether the provisions of s. 113 of the Criminal Procedure Code prevent a statement made under s. 112 from being given in evidence at all, even in civil

> proceedings, but *having decided that statements made under s. 112 are absolutely privileged it is not necessary for me to decide this further question*. Nor, having found that the statement, in this case, was made under s. 112 it is necessary to decide whether information to the police under s. 107 is, or is not, absolutely privileged.
>
> These two cases involve actions for defamation. *But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect*. Further, as a matter of public policy, I am of the view that *it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses*.
>
> For the foregoing reasons, in the circumstances shown in the present application, *the defence is not entitled to be supplied with police statements*.
>
> (emphasis added)

**[57]** The decision by Syed Othman FCJ at the High Court was endorsed by the Federal Court in *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80 where Suffian LP *inter alia* said this:

> *... If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.*
>
> ...
>
> *Our conclusion is not inconsistent with the judgment of Syed Othman F.J. in Husdi v. Public Prosecutor [19791 2 MLJ 304 out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses* and *which he answered in the negative,* which answer was not challenged before us. (emphasis added)

**[58]** The appellant also had made a similar application seeking among others, the witness's statements recorded by the Malaysian Anti-Corruption Commission ("MACC") but the Federal Court in that case, *Dato' Sri Najib Hj Abdul Razak v. PP* [2019] 1 LNS 434; [2019] MLJU 282 has dismissed the application and commented as follows:

> [22] The granting of the order sought by the appellant *will effectively mean that the entire Investigation Papers have to be delivered to the appellant as all witness statements and documents obtained by the Investigation Officer under s. 30(9) of the MACCA and s. 40 of AMLATFAPUA Act 613* are obtained pursuant to non-obstante clause statements and documents. *The submission if accepted has a far reaching consequences for in the future the entire Investigation Papers have to be delivered to the defence for all cases under these laws.* (emphasis added)

(see also *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* (CA) (*supra*)).

**[59]** Here, we are of the view that the decision in *Siti Aisyah*'s case (*supra*), relied upon by the appellant on this issue, is inconsistent with the settled principle of law pronounced by our apex court on privileged document of statement recorded during the investigation.

**[60]** As there is a real danger of tampering with the witnesses if the statements are to be disclosed, it is undesirable of its production pursuant to s. 51 of CPC. In addition, the appellant's application for the production of all investigation statements recorded under s. 32 of the AMLATFPUA and s. 30(8) of the MACC Act amounts to a fishing inquiry. This too can be seen in the notice of motion which state among others that the documents sought are in all probability favourable to the defence of the appellant. The appellant also failed to show the relevancy of those documents for the trial against the appellant. As such, the statements sought are also unnecessary and undesirable for the trial.

**[61]** Above all, the decision of the trial judge in dismissing the application for witness statement is not an order falling within the definition of 'decision' in s. 3 of the Courts of Judicature Act 1964 and therefore not appealable under s. 50(1) of the same Act.

**[62]** The Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; [2010] 6 MLJ 585 has decided that the ruling by the trial judge in dismissing the application for witness statement recorded under s. 112 of the CPC is not appealable. On this issue, the court explained as follows:

> [18] It should be stated at the outset that, **appeal is a creature of statute.** Therefore, whether there is a right of appeal or otherwise in a given case will be governed by the relevant statute. In this present case, **it will be s. 50 of the CJA,** the relevant part of which reads:
>
> 50 Jurisdiction to hear and determine criminal appeal
>
> (1) Subject to any rules regulating the proceeding s of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> [19] The word 'decision' appearing in sub-s. (1) of the 50 is defined in s. 3 of the CJA as follows:
>
> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.
>
> ...

[24] The underlying reason behind the amendment to the definition of 'decision' in s. 3 of the CJA, introduced by Amendment Act A1031 of 1998, which came into effect on 31 July 1998 is to stop parties from stalling a trial before the trial court by filing appeal after appeal on ruling s made by trial court in the course of a trial. This is what the amendment seeks to achieve as evident from the explanatory statement to the Bill which reads:

> 2 Clause 2 seeks to amend s. 3 Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. Is such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial courts. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[25] Quite apart from the explanatory statement to the Bill the definition of 'decision' by itself, to our mind, is sufficiently clear, and it is the duty of the court to give effect to the same. Justice demands that case should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, it any, to be filed after the trial process is brought to its conclusion.

[26] For the above reasons, **we agree with the Court of Appeal that the ruling of the trial court in the case is not a 'decision' as defined in s. 3 of the CJA and hence it is not appealable**. (emphasis added)

**[63]** As such, the appellant's application for witnesses' statement in the present case is without merit.

*Documents In Relation To SAC Rajagopal Ramadhass's Averment In His Affidavits*

**[64]** The appellant sought the supporting documents that support the finding of SAC Rajagopal that 1MDB officials have misappropriated a substantial portion from the issuance of bonds of USD$1.367 billion without the knowledge and consent of the 1MDB board of directors.

**[65]** On this matter, we find that the documents sought if exist, are not relevant to the case against the appellant for using his position for gratification and receiving proceeds of unlawful activity. The involvement of another person, even if proven, does not exonerate the appellant of the charges against him.

**[66]** Furthermore, the documents sought are unspecified and the application is more of a roving and 'fishing expedition' which is not permitted by law as discussed earlier.

*Tim Lessner's IPhones, Passwords, And Documents Related To It And Data On Goldman Sachs's Server Related To Tim Lessner's Communications*

**[67]** The items and documents sought by the appellant here are not in the possession of the respondent and as such the court would not act in vain in ordering its production which cannot be complied with by the respondent. Moreover, the appellant's counsel in his oral submission, indicated that the appellant is not pursuing with the application for the production of those items and documents since they are not in the possession of the respondent.

**[68]** Be that as it may, in the appellant's written submission, it was contended that the contents of Tim Lessner's iPhones highly likely could show communication between Tim Lessner's and 1MDB official which could disclose evidence that the appellant did not know about the criminal scheme and the 1MDB officials whom Tim Lessner paid bribes and kickbacks. In this regard, we find that it is merely speculative that the contents of the communication would show such a fact. This is again another roving and fishing inquiry. In any event, we are also of the view that the items sought are not relevant to the trial against the appellant in relation to the charges detailed earlier.

*Settlement Agreement Between The Government Of Malaysia And Goldman Sachs*

**[69]** The appellant's reason to seek the settlement agreement is that it may contain a clause that requires Goldman Sachs and its employee to cooperate with the respondent which includes Goldman Sachs' representatives and employees being called as witnesses in the 1MDB trial. The appellant believed that such clause in the said agreement obliges and compels such witnesses to give evidence favourable to the respondent and to suppress evidence favourable to the appellant. This too, is merely speculative and a fishing inquiry that should not be permitted.

*The Calling Of Witnesses During The Prosecution Case Under S. 425 Of The CPC*

**[70]** The appellant in the present case is also seeking an order for the court to summon SAC Rajagopal a/l Ramadhass from the Malaysian Royal Police, Deputy Commissioner Zamri bin Zainal Abidin from the Malaysian Anti-Corruption Commission and Mohd Fuad Arshad from Bank Negara Malaysia to testify in court during the prosecution case. The reason is that their names are not listed in the respondent list of witnesses and this would deprive the appellant to cross-examine these witnesses on the issue of the criminal scheme between Jho Low and the 1MDB officials.

**[71]** For ease of reference, s. 425 of the CPC is reproduced below:

> Power of Court to summon and examine persons
>
> 425. Any Court **may** at any stage of any inquiry, trial, or other proceeding under this Code **summon any person as witness**, or examine any person in attendance though not summoned as a witness, or recall and

re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person **if his evidence appears to it essential to the just decision of the case**. (emphasis added)

**[72]** The above provision is unambiguous that the court has the discretion to summon any witness to be examined in court, if his evidence is essential to the just decision of the case.

**[73]** This discretionary power of the court however must be considered in the light of a trite principle of law that the prosecution has the discretion to call any witness at the prosecution stage to prove its case against the accused and the court would not interfere with this exercise of discretion. This includes the calling of material witnesses that is essential in unfolding the narrative of the case. This has been explained by the Federal Court in *Rosli Yusof v. PP* [2021] 7 CLJ 681; [2021] 7 MLJ 681 in the following manner:

[34] We accept the submission advanced by learned Deputy Public Prosecutor that *the prosecution is solely responsible for deciding how to present its case and choosing which witnesses to call*. The *dictum* of Lord Thankerton in the case of *Adel Muhammed El Dabbah v. Attorney General for Palestine* [1944] AC 156 at pp. 168-9; [1944] 2 All ER 139 that "*the court will not interfere with the exercise of that discretion, unless, perhaps it can be shown that the prosecutor has been influenced by some oblique motives*" has been followed and accepted by our courts. Having said that, we hasten to add that the discretion is not unfettered. The prosecution must exercise his or her power to choose which witness to call consistent with the requirement of fairness. *He or she is under a duty to call all credible witnesses whose evidence is essential to fully presenting the narrative of the case. The obligation to call witnesses is sometimes expressed in terms of the prosecution's duty to call "material witnesses"*. "Material" has a wide meaning and in this context, it is evidence which is admissible and capable of influencing the court's assessment of guilt or otherwise is capable of being material (see *Dyers v. R* [2002] 210 CLR 285, [2002] HCA 45 at para. [11]; and *R v. Manning* [2017] QCA 23 at para. [19]. Unless there is a good reason for not calling the witnesses, prosecutors should call all eye witnesses to the events constituting the alleged offence.
(emphasis added)

**[74]** In this regard, the failure of the prosecution to call material witnesses resulting a gap in the prosecution case would open for the invocation of an adverse inference under s. 114(g) of the Evidence Act 1950 and in the circumstances the prosecution taking the risk for the case against the accused to be dismissed.

**[75]** The Federal Court case of *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630 explained the position as follows:

Anyway, in the context of s. 114(g) of the Evidence Act, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in a criminal prosecution. *It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion*

*as to what witnesses should be called by it (see Khoon Chye Hin v. PP [1961] 1 LNS 41; [1961] MLJ 105, CA, Adel Muhammed El Dabbah v. Attorney General of Palestine [1944] AC 156, PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215; [1999] 2 MLJ 1). However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence* to prove *the case against the accused beyond reasonable doubt* (see *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16, at 19, (SC)). Thus, in *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386; [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p. 388 (CLJ); 229 (MLJ):

> *Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution* (*Abdullah Zawawi Omar v. Public Prosecutor*). Insofar as the trial Court is concerned, *its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt* (*Abdullah Zawawi Omar*'s case). (emphasis added)

**[76]** On the same issue, in the case of *Chua Keem Long v. PP* [1996] 1 SLR 510 Yong Pung How CJ said this:

> *All the prosecution needs to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt*. Out of a number of witnesses, *it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called*, nor why any should be drawn *presumption* that the evidence of those witnesses not produced would have been against the prosecution.
>
> In such circumstances, it is also not necessary for the prosecution to offer or make available the remaining witnesses to the defence.
>
> (emphasis added)

**[77]** In the present case, the appellant's reason for making the application for the court to summon the three investigation officers as mentioned earlier was to avoid the defence being deprived of the opportunity to cross-examine the witnesses on the alleged criminal scheme. No basis was advanced to show the materiality of these witnesses to the prosecution case. The opportunity to examine these witnesses is still open at the defence stage by the defence calling them to testify. Therefore, having considered the relevancy of the three witnesses to testify during the prosecution case, the materiality of their evidence, and the prosecution's discretion to call witnesses to establish its case, we find that the appellant had failed to show, the calling of these witnesses is for the just decision of the case envisaged under s. 425 of the CPC. As such, the appellant's application is bereft of any merit.

**[78]** It is also to be noted that the decision of the High Court in dismissing both the originating motions were in the exercise of the trial judge's discretion under ss. 51 and 425 of the CPC. Being the trial judge who were presented with the charges against the appellant and evidence by prosecution witnesses thus far, is in a position to access what are the evidence, oral or documentary, necessary or desirable for the trial and just decision of the case.

**Conclusion**

**[79]** Based on the aforesaid reasons, it is our unanimous decision that there is no appealable error by the High Court in its decision in relation to both originating motions that warrants the intervention of this court. Both appellant's appeal are dismissed and the High Court decision is affirmed.